IMPEACHMENT OF THE PRESIDENT.

OPINION

OF

MR. VICKERS, OF MARYLAND,

IN THE SENATE OF THE UNITED STATES, MAY 11, 1868.

OPINION

OF

GEORGE VICKERS, OF MARYLAND,

ON

IMPEACHMENT OF THE PRESIDENT.

The Constitution secures to the President of the United States the nomination of civil officers, and their appointment, if the Senate shall advise and concur. He is the initiating and acting power, and gives character and form to the proceeding before it is presented to the consideration of the Senate, which body has no power to present the name of any one to the President as an object of official favor. The act of 1789, which created the Department of War, does not limit the tenure of the office of the Secretary of that department, but assigns such duties as shall be enjoined upon and entrusted to him by the President, agreeably to the Constitution.

Soon after the government went into operation, the power of removal from office was exercised by the Executive during the session as well as in the recess of the Senate; the commissions to the Secretaries and many other officers contained the statement that they held at the pleasure of the President. A practice immediately arose and prevailed, and was continued down to the year 1867, of removal from office by the Executive; the power of removal was claimed as an incident to that of appointment, and as essential to a faithful execution of the laws, on the ground that unless the President possessed it he could not remove a faithless officer who might be engaged in obstructing the execution of the laws or in embezzling the public funds; the duty of the President under the Constitution, to take care that the laws should be faithfully executed, could not be efficiently discharged unattended by the power of removal. Although differences of opinion may have existed upon this as well as other provisions of that instrument, yet the practice uninterruptedly continued, with the implied assent of the legislature, for upwards of 75 years, and constituted a legislative construction which was affirmed by different Attorney Generals of the United States, whose attention had been specially called to the subject.

The acquiescence by Congress in that construction, whether originally correct or not, was fully sufficient to justify President Johnson in its exercise. Although it may be termed an implied power, it is as valuable and essential to a co-ordinate department as an express grant. The power to create banks, and of erecting custom and light-houses, is derived by implication. The concurrent authorities of Kent and Story refer to the power of removal of officers by the President, as established by usage and acquiescence, as well as by the opinions of the most eminent lawyers, judges, and statesmen, as the settled construction of the Constitution. It was advocated and practiced by Jefferson, Madison, Monroe, Jackson, Van Buren, and other Presidents, down to Mr. Johnson. The elder Adams removed Mr. Pickering, Secretary of State, during the ses-

sion of Congress, and without consulting it; he requested Mr. Pickering to resign, and on his refusal removed him by a peremptory order, and nominated John Marshall his successor. The right of Mr. Adams does not seem to have been questioned. The act of 1789, in its second section, provides for the appointment of a chief clerk in the Department of War, who, whenever the principal officer, the Secretary, shall be removed by the President, or in any other case of vacancy, shall have the charge and custody of all the records and papers in the office. The language of this act recognizes an existing right in the President, under the Constitution, to remove a Secretary at his discretion. The debates in Congress in 1789, by the ablest men of the nation, show that the power of removal from office was conceded to be in the President, and the bills establishing the departments and regulating the duties to be performed were framed purposely to conform to that construction of the Constitution. Thus, in the act relating to the Treasury Department, the seventh section provides that the assistant shall take charge of the records, books, and papers "whenever the Secretary shall be removed from office by the President of the United States, or in any other case of vacancy." In the same year the Department of Foreign Affairs was created, and in the second section of the act it is declared that there shall be appointed an inferior officer, to be called the chief clerk, and who, "whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy, shall, during such vacancy, have the charge and custody of the records," &c. These three statutes do not confer the power of removal, but they treat it as existing in the executive department, and were designed and draughted to exclude the presumption of implication of a grant of that power to the President by legislative authority

The act of the 2d March, 1867, regulating the tenure of civil offices, and passed over the President's veto, was intended to alter and change the settled construction of the Constitution, and to empower the Senate to continue a cabinet officer in commission against the will and wishes of the Executive, and to restrain and check his wonted power of removal; the statute trenched upon and materially impaired what the President and his legal advisers, including the Secretary of War, believed and declared to be a constitutional right and prerogative of the executive department. The President having sworn to "preserve, protect, and defend the Constitution of the United States," considered it to be his duty, as custodian of the executive department, to treat the act as unconstitutional and to exert the power claimed and exercised by all his predecessors. The statute of 2d March, 1867, essays to create an offence of a high misdemeanor in any one who may attempt to violate it, and for this effort of the President to maintain the integrity of his department until the judiciary, the only arbiter to determine a question of such magnitude in the last resort, should decide, the impeachment is predicated.

If one department shall attempt or do what another department shall believe to be an essential and vital encroachment upon its high powers or functions, the law of self-defence is as applicable as it would be to a personal attack by one upon another. It cannot be expected that the executive department is to be the agent for executing a statute upon itself which is to dismember and deprive it of half its vigor or vitality; the duty enjoined upon the President to see that the laws are executed was not designed to operate in such a case, for the practical recognition of such a principle might be used to work the destruction of the whole frame of the government and make the Constitution its own destroyer. The allegation that if the President shall be permitted to contravene a statute which he and his cabinet believe invades and infracts the constitutional limits and powers of the department over which he presides, and feels bound to preserve, that he may be at equal liberty to disregard any law of different character and object, has no more force than that the right of self-defence may be extended to justify an individual in assaulting every person he may chance to meet. If

it is in the lawful competency of Congress to punish the infraction of every law by pains and penalties, and to deprive the courts of the United States of their jurisdiction over the same, Congress would soon become omnipotent, the co-ordination of the departments be destroyed, and the structure and genius of our government be changed by the action of one department.

It may well be questioned if the cabinet officers who were appointed by a former President, and not reappointed in a second term, either by that President or by Mr. Johnson, his successor, were intended to be embraced by the act of 2d March, 1867; if it were a matter of doubt the accused would be entitled to the benefit of it. From a careful examination of the act, taken in connection with the avowed purpose of it, as declared in the Senate and House of Representatives, by the committees of conference, at the time of its final passage, my opinion is that such officers were not, nor intended to be, included in it. Entertaining the views I have expressed, I do not consider that the first and eighth articles of impeachment are sustained.

The act of Congress of 1795, ch. 21, provides for the filling of all vacancies by the President, by appointments *ad interim* for a period not exceeding six months. The power of removal or suspension necessarily carries with it the right to fill the vacancy temporarily on the ground of public necessity; the exigency may exist at any time, whether during the session or in the recess of the Senate, and the public interest and service may require the promptest action by the President. The acts of 1863 and 1867 do not, by implication, repeal the cases provided for and covered by the act of 1795, which embraces all cases of vacancy from whatever cause, and authorizes *ad interim* employments, but only such as are occasioned by death, resignation, absence or sickness, leaving the vacancies occasioned by removal and expiration of commission unrepealed. The act of 1867 regulating the tenure of certain civil offices, by its second section, empowers the President to fill vacancies which may happen during the recess of the Senate, by reason of death or resignation, and in such cases to grant commissions, which shall expire at the end of the next session thereafter, but makes no provision for filling vacancies which may occur during the session of the Senate, leaving such to be filled under existing laws and the usages of the department. The eighth section of the tenure-of-office act declares that whenever the President shall, without the advice and consent of the Senate, designate, authorize or employ any person to perform the duties of any office, he shall notify the Secretary of the Treasury, &c. This recognizes the right of the President to make *ad interim* appointments without the consent of the Senate. This class of appointments is not the same mentioned in the third section of that act, because he is authorized by that section to issue commissions to expire at the end of the next session; but in the eighth section it is stated to be a mere designation or employment of some person to perform the duties of an office. According to usage, from the necessity of the case, and the act of 1795, unrepealed in part by 1863 or the act of 1867, the President had the power to designate General Thomas to perform, for a brief period, the duties of the Department of War. To avoid circumlocution I have sometimes used the word appointment, instead of designation or employment in connection with *ad interim* duties, but an appointment to office, legally and technically, has three essential elements: 1. A nomination by the President. 2. A confirmation or approval by the Senate. 3. A commission signed, sealed, and delivered to the appointee. A concurrence of all is necessary to its consummation. The designation of a person to take possession and fulfil the duties is but for a temporary purpose, till a suitable successor can be found and his nomination sent to the Senate; the public interest may demand such a course of action. The proceedings in this case abound with instances of *ad interim* employments, directed by all the Presidents from Mr. Adams (the elder) to Mr. Johnson, including President Lincoln. The designation of General Thomas was on the

21st February, and the nomination of Mr. Ewing was sent to the Senate on the 22d February, but in consequence of an early adjournment, and the next day being the Sabbath, it was not actually received by the Senate till Monday, the 24th of that month. But if the President, the Attorney General, and other cabinet officers were mistaken in their construction of the law, which I do not think, such an error was a venial one, and cannot properly be considered a high crime or high misdemeanor.

But if none of the laws alluded to authorized the *ad interim* appointment of General Thomas, yet, if Mr. Stanton's case is not covered by the first section of the act of March 2, 1867, called the tenure-of-office law, the 2d article and others into which it enters are not subjects of impeachment. Mr. Stanton was appointed by Mr. Lincoln in 1862, during the first term of his Presidency; his term expired with Mr. Lincoln's, as definitively as if the latter had not been re-elected; he was not reappointed either by Mr. Lincoln or by President Johnson, and only held by courtesy and sufferance. The month allowed to the cabinet officers appointed by Mr. Johnson and confirmed by the Senate does not apply to officers appointed by Mr. Lincoln, and who held no legal term under President Johnson. The latter, therefore, committed no misdemeanor in designating General Thomas to perform the duties till a regular nomination could be made: first, because Mr. Stanton's case is not protected by the first section of the act of 1867, all the subsequent sections having reference to the cases only which are included in that section—the sixth section, relating to *ad interim* appointments, expressly declaring them to be "contrary to the provisions of this act," and if not within the first section, it cannot be within the sixth; secondly, because no other act forbids such appointments; and thirdly, because it was in conformity to the settled practice of the executive department since its formation, acquiesced in by all the departments, and necessary to a proper and faithful execution of the laws. In any aspect of the case the second and third articles are not maintainable. With the views already expressed, that the President is not guilty of the principal charge, as modified and extended over other articles, it follows that he is not punishable on the charge for conspiring to do the acts mentioned in the fourth, fifth, and seventh articles, and especially not in the absence of all proof of any such conspiracy. The sixth article charges a conspiracy to seize and take by force the property of the United States in violation of the conspiracy act of July, 1861. This statute does not, in my opinion, apply to the removal of an officer under claim of constitutional right; besides, no proof was offered of any authority from the President to use force, (none was used,) and no legitimate inference of such an intention can be drawn under an act penal in its character when the presumptions are favorable to the citizen, and especially to a high public functionary of the government in the discharge of official duty. The ninth article, which alleges an attempt to seduce an officer of the army from his duty to promote sinister purposes of the President, appears to be wholly unsupported by proof. The commander-in-chief has an undoubted right to consult with his subordinates, to inquire into the disposition of the military forces, and to express opinions; the relation between them precludes the presumption of an unlawful purpose in making proper inquiries and communications. In such a case the charge should be expressly proved; but there was not only no evidence offered tending to prove it, but a laudable motive was proved by the Secretary of the Navy, who suggested to the President the propriety of making the investigation.

The tenth supplemental article is in reference to certain public speeches of the President, and charges that they are high misdemeanors in office. These speeches were made in a private, and not in an official, capacity, and however injudicious some may think portions of them, and to be regretted, I know of no law which can punish Mr. Johnson with a removal from office because they were made. As we have no law to punish those who may indulge in political dis-

cussions, it cannot reasonably be expected that the President should be removed for exercising a privilege enjoyed by every American citizen; the first amendment to the Constitution declares that Congress shall pass no law abridging the freedom of speech or of the press.

The eleventh article is anomalous, indefinite, and liable to the objection of multiplicity. If it were possible to put it in the form of an indictment or of a declaration in a civil action, it would be quashed on motion by a court of law. The first item or paragraph is not in the form of a charge, but is the recital of a speech contained in the tenth article and appears to be only introductory, or alleged as inducement to a charge which follows, viz: that the President, in pursuance of said speech made in August, 1866, attempted to prevent the execution of the tenure-of-office act, passed on the 2d March, 1867; then follows a vague allusion to the means by which he made the said attempt, to wit, on the 21st February, 1868, by unlawfully devising, contriving, and attempting to devise and contrive, means to prevent E. M. Stanton from forthwith resuming the functions of the office of Secretary of War, which had been peaceably and quietly resumed on the 13th January, 1868, about five weeks prior to the alleged contrivances, as appears by Mr. Stanton's affidavit to procure a warrant for General Thomas's arrest, and also by the first article of impeachment. The other means are to prevent the execution of the act making appropriations for the support of the army—of which no proof was offered except that in relation to the ninth article in reference to General Emory's interview with the President. The last means charged are to prevent the execution of an act to provide for the efficient government of the rebel States, passed 2d March, 1867; the only evidence introduced was a telegram to Governor Parsons, dated several weeks prior to the passage of the said act alleged to be violated. This eleventh article seems to be made up by uniting fragments or portions of other articles; if separately the articles in full are not sustained, the joining together of some of their disunited parts cannot impart to them additional strength or vitality. There is no proof of any connection between the speeches referred to and the tenure-of-office act, nor between that act or any alleged violation of it and the means and contrivances imputed to the President. It was contended on the part of the prosecution that the act of 1789, and not the Constitution, conferred upon the President the power of removal from office and separated that power from that of appointment. The act of 1867 does not essay to punish a removal under the act of 1789 unless made in the recess of the Senate, and as Mr. Stanton's removal was during the session of that body, the prohibition of the act is not applicable. The act of 1789 is general, and not confined in its operation to the recess of the Senate or to its sessions; its language is, "whenever the said principal officer (the Secretary being meant) shall be removed from office by the President of the United States," the inferior officer shall have charge of the records, books, and papers appertaining to the department.

A President and his cabinet may be called upon to examine and determine the meaning, scope, and operation of statutes they may be required to execute materially affecting the powers, duties, and practice of the executive department of the government. Judgment is necessarily involved in that examination and consideration. If, after a candid and diligent investigation and mature deliberation, the President acts upon the conclusion thus formed, can it be contended that for doing so he is guilty of a high crime or misdemeanor and punishable by removal from office? There must be some wilful and manifest abuse of authority, usurpation, or corruption in such a case to justify a proceeding so degrading in its character and consequences. If Congress, by legislation of two-thirds, after the exercise of the veto by the Executive, should assume the power of making appointments to office, irrespective of his right of nomination, of negotiating and confirming treaties, of diminishing his compensation during the term for which he was elected, can it be said that he would have no right to judge of

the constitutionality of these acts? and, if he should refuse to regard them, to be subjected to impeachment and removal, as well as to fine and imprisonment, although they attempted to abstract the essential attributes of his office and reduce the department to a subordinate and inferior condition? Surely such a proposition could not be seriously advocated. But further, suppose that Congress by its acts should grant titles of nobility and require the President to issue commissions to perfect them, or pass bills of attainder or *ex post facto* laws, or lay a capitation tax without reference to the census, and devolve the execution of the statutes upon the President; shall he be bound, regardless of his oath to protect and defend the Constitution, to execute them against his own convictions and against the unanimous opinion and advice of the Attorney General and his other constitutional advisers? If in any case the right of judgment is to be exercised, no criminality can be legally imputed for its honest exercise, though the conclusion may be erroneous.

For these reasons, independent of those already assigned, and from a careful consideration of the evidence adduced and of the circumstances of the case, I do not think that the first eight and the eleventh articles can be maintained.